The Hartz Mountain Corporation *and* District 65, U.A.W.

The Hartz Mountain Corporation *and* Local 806, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Cases 22-CA-9106, 22-CA-9588, 22-RC-7803, 22-RC-7753, and 22-RC-7754

February 19, 1982

DECISION, ORDER, AND DIRECTION OF ELECTION

MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 6, 1981, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and District 65, U.A.W., filed a brief in opposition to the Employer's exceptions to the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the request of District 65, U.A.W., to withdraw its charges in Cases 22-CA-9106 and 22-CA-9588 be, and it hereby is, granted, and that the consolidated complaint in said cases be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the disclaimer of interest filed by Local 806, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, be, and it hereby is, approved; and that the request by Local 806 to withdraw its petitions in Cases 22-RC-7753 and 22-RC-7754 and its intervention in the petition filed by District 65 in Cases 22-RC-7803, be, and it hereby is, approved with prejudice.

IT IS FURTHER ORDERED that the election held on April 20, 1979, be, and it hereby is, declared a nullity; and that Case 22-RC-7803 be severed and remanded to the Regional Director for Region 22 for the purpose of holding forthwith an election based on the Stipulation for Certification Upon Consent Election approved on March 30, 1979.

Local 806, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which received a majority of the votes in the election conducted on April 20, 1979, has disclaimed interest in representing the employees in the unit found appropriate, leaving the results of the April 20, 1979, election indeterminate. For this reason, and not due to any finding of objectionable conduct or unfair labor practices by any party participating in the April 20, 1979, election, a new election is being directed among the remaining parties based on the Stipulation for Certification Upon Consent Election approved March 30, 1979.

[Direction of Election and *Excelsior* footnote omitted from publication.]

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: A hearing in the above-captioned consolidated cases commenced before me on June 23, 1981, and has continued on various days during the months of June, July, September, and October 1981.[1] As of this date counsel for the General Counsel have called 35 witnesses to testify in this proceeding and have not yet completed the presentation of their case.

It is noted that, although served with the notices of hearing in this proceeding, Local 806, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 806, has neither appeared nor participated in this hearing, except to the extent that counsel representing that labor organization appeared at a meeting held at my office on August 12, 1981, to discuss the possibility of resolving all or part of the matters in dispute.

The fourth amended consolidated complaint in this matter was issued by the Regional Director for Region 22 on June 23, 1981. That complaint, as amended during the course of the hearing, set forth, *inter alia*, the following allegations:[2]

(1) From October 1978 to April 1979 the Respondent threatened to close its facility or to move its facility if its employees selected District 65, U.A.W., as their collective-bargaining representative.

(2) From October 1978 to April 1979 Respondent threatened its employees with the loss of benefits and threatened other reprisals to discourage them from selecting District 65 rather than Local 806 as their collective-bargaining representative.

[1] At the commencement of the hearing, the charges in Cases 22-CA-10692 and 22-CA-10723 were severed from the instant proceeding inasmuch as the allegations therein were settled before the hearing opened.

[2] It is agreed that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. There also is no dispute that District 65 and Local 806 are labor organizations within the meaning of Sec. 2(5) of the Act.

(3) From October 1978 to April 1979, the Respondent threatened its employees to refuse to bargain with District 65 if its employees selected that Union rather than Local 806 as their collective-bargaining representative.

(4) From October 1978 to April 1979, the Respondent promised wage increases to its employees in order to encourage them to select Local 806 rather than District 65 as their collective-bargaining representative.

(5) In November 1978 and in mid-1980, the Respondent threatened employees with retaliation for engaging in activities on behalf of District 65.

(6) In November and December 1978, the Respondent interrogated an employee regarding his activities on behalf of District 65.

(7) On July 8, 1981, the Respondent interrogated an employee concerning the identity of witnesses to be called in the instant proceeding.

(8) From the latter part of April or the beginning of May 1979 and on or about May 21 and 27, 1981, the Respondent threatened employees with reprisals in order to discourage them from giving testimony.

(9) From December 1978 through April 1979, the Respondent kept its employees' activities under surveillance on behalf of District 65.

(10) From October 1978 to April 1979, the Respondent accorded preferential treatment to supporters of Local 806 by allowing them to campaign freely throughout the Respondent's facility whereas such activity was prohibited by supporters of District 65.

(11) Since October 1978, the Respondent has given preference in hiring to applicants for employment referred by supporters of Local 806.

(12) Since October 1978 and until December 1978 the Respondent has solicited and encouraged its employees to sign union authorization cards on behalf of Local 806.

In addition, the General Counsel seeks a bargaining order in favor of District 65 notwithstanding the fact that Local 806 obtained a majority of the votes cast in an election conducted on April 20, 1979, in the related representation proceeding described hereinafter. In this respect, the General Counsel contends, *inter alia*, that District 65, at a relevant period of time, represented a majority of the bargaining unit employees as evidenced by their execution of District 65 authorization cards, that Local 806 was the recipient of substantial assistance from the Respondent, and that the unfair labor practices alleged to have been committed were of such a nature as to make impossible the holding of a fair and free election.

The Respondent denied the allegations of the consolidated complaint and, based on its position and the expectation that it will vigorously defend its position, it is apparent that substantial issues of fact and credibility will need to be resolved. The Respondent additionally contends that many of the allegations of the complaint and much of the proof presented thus far relate to conduct committed by rank-and-file employees whose actions therefore cannot bind the Respondent. Moreover, the Respondent argues that, even if the conduct alleged is proved and even if it is shown that it were authorized or directed by the Company, a bargaining order would not be appropriate inasmuch as District 65 lost the election and a majority of the votes were cast in favor of Local 806, the competing labor organization.[3]

The election described above was held in connection with petitions for elections filed by both District 65 and Local 806. The petitions in Cases 22-RC-7753 and 22-RC-7754 were filed by Local 806 on January 11, 1979. The petition filed by District 65 in Case 22-RC-7803 was filed on March 12, 1979. On March 27, 1979, both Unions and the Respondent executed a Stipulation for Certification Upon Consent Election which was approved by the Acting Regional Director for Region 22 on March 30, 1979. Pursuant to the stipulation, a secret-ballot election was held on April 20, 1979, wherein the production and maintenance employees at the Respondent's Jersey City, New Jersey, facility voted. The tally of ballots shows that Local 806 received 178 votes, that District 65 received 156 votes, that one vote was cast against both Unions, and that there were two challenged ballots.

Following the election, District 65, on April 26, 1979, filed timely objections to the election, alleging that the Respondent and Local 806 engaged in conduct requiring that the election be set aside. Pursuant to a Report on Objections, order consolidating cases, and notice of hearing, dated July 17, 1979, the Regional Director for Region 22 recommended to the Board that a hearing be held on certain of the allegations of objectionable conduct by Respondent and Local 806. Accordingly, the matters alleged by District 65 as objectionable conduct in the representation cases were thereafter consolidated with the allegations of the unfair labor practice proceedings. In the objections District 65 alleges, as against the Company, essentially the same conduct as is alleged in the unfair labor practice complaints, except as to conduct occurring prior to the filing of the representations petitions. As against Local 806, District 65's objections allege as follows:

1. That Local 806 "threatened loss of jobs and benefits were District 65 to win the election."

2. That Local 806 made material misrepresentations of fact at a time when District 65 could not make an appropriate response.

3. That Local 806 promised "pay raises and direct cash payments" to induce voters to vote for it.

4. That Local 806 told employees that it and the Company had already reached agreement on wage increases for employees which would be retroactive to December 1.

5. That Local 806 told employees that the employer would never recognize District 65 as the collective-bargaining representative.

It is noted that the same parties to this proceeding had previously been involved in prior unfair labor practice litigation in *Hartz Mountain Corporation*, 228 NLRB 492 (1977), enfd. 593 F.2d 1155 (D.C. Cir. 1978). In that case, wherein the initial charge was filed on November 23, 1973, the court of appeals, on September 26, 1978, enforced the Board's Order and concluded, *inter alia*, that the evidence supported the Board's findings that the Re-

[3] See for example, *Mr. Wicke Ltd. Co.*, 172 NLRB 1680 (1968). Cf. *Vernon Devices, Inc.*, 215 NLRB 425 (1974).

spondent had given unlawful assistance to Local 806 in the following respects: by having supervisors solicit employees to sign Local 806 membership cards; by allowing Local 806 adherents to solicit membership cards on company time and premises; by discharging employees who supported District 65; and by recognizing Local 806 as the representative of its employees at a time when it did not have majority support from the employees in the appropriate bargaining unit. While it should not be concluded that the prior case is, itself, evidence in support of the allegations herein, it is clear that the General Counsel is taking the position that the prior unlawful conduct had continued even after entry of the court's order. It also is evident that whereas the prior case took almost 5 years from the filing of the first charge to the court's decree, the present cases, given the issues presented and the number of witnesses to be called, will probably take an equal or greater amount of time before a final resolution can be made on the merits.

On October 13, 1981, Local 806 by Anthony Calagna, its treasurer, filed the following letter with the Regional Director for Region 22:

> Please be advised that Local 806 IBT, hereby withdraws its petitions for certification in Case Nos. 22-RC-7753 and 22-RC-7754. Local 806 also withdraws its intervention in the petition filed by District 65 in case No. 22-RC-7803.
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> Please be further advised that Local 806 disclaims any interest in representing the employees at Hartz Mountain Jersey City plant. Local 806 has no objection to an immediate election to be held at the plant with only District 65 on the ballot.

On October 16, 1981, District 65 filed with me, after serving all the parties, the following motion:

> District 65, U.A.W., the Charging Party herein, respectfully moves the Administrative Law Judge in the instant case to permit withdrawal of the charges in this case on the following basis:
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> 1. Since October 23, 1978, the employees at the Jersey City plant of Hartz Mountain have gone unrepresented.
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> 2. On April 20, 1979, an election was conducted wherein District 65 and Local 806, IBT, were both on the ballot. The results of that election were never certified since District 65 filed objections to the election and unfair labor practice charges. A consolidated hearing on the objections and complaint flowing from those charges has been in progress since June 26, 1981.
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> 3. District 65 has now received a copy of a disclaimer and withdrawal of interest in this matter by Local 806. A copy of said disclaimer is attached hereto.
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> 4. District 65 requests withdrawal of the within charges on the following conditions:
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> (a) that the election conducted on April 20, 1979 be declared a nullity;
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> (b) that the Administrative Law Judge and the Board direct another election;
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> (c) that District 65 be the only labor organization on the ballot seeking certification of the employees; and
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> (d) that the eligibility date for voting in such election be fixed as soon as possible.
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> 5. Should the Administrative Law Judge or the Board not approve the withdrawal of the charges based on the foregoing conditions, the Charging Party urges that the trial in this matter continue forthwith.

In connection with District 65's motion, the General Counsel does not object to the motion, asserting that its approval would be a reasonable way to resolve the underlying question concerning representation and avoiding the extensive costs and delays attendant to the litigation of these cases.

The Respondent, however, opposes District 65's motion, asserting a number of grounds for denying it. Primarily, the Respondent contends that Local 806's disclaimer of interest should not be honored because it is untimely and inappropriate for reasons of law and of public policy.

On October 16, 1981, I directed the parties to submit written memoranda in support or in opposition to the motion and set October 26, 1981, as the filing date. After due consideration, it is recommended that District 65's motion be granted in its entirety for the reasons set forth below.

Conclusions

It is axiomatic that a labor organization, as a general matter, cannot be compelled, against its will, to be the collective-bargaining representative of a unit of employees. Accordingly, a labor organization may, even if it is the incumbent representative of a bargaining unit, choose to disclaim an interest in representing such employees. *Little Rock Machinery Company*, 107 NLRB 715 (1954). At the same time, a "disclaimer to be effective must be unequivocal and must be made in good faith," and an assertion by a union that it has abandoned its claim to representation will be rejected, "if the surrounding circumstances justify an inference to the contrary," or if the union's conduct is "inconsistent" with its alleged disclaimer. *Retail Associates, Inc.*, 120 NLRB 388, 391 (1958). Thus, where for example, an employer seeks an election so that its employees can vote on whether they wish to be represented by a union, a union's disclaimer of interest will not be honored and an election will be held if it is shown that the union has not, in reality, abandoned its recognitional objectives and has taken actions (such as picketing), which are inconsistent with its alleged disclaimer. *Gazette Printing Company*, 175 NLRB 1103 (1969).

As a related matter, a union's request to withdraw its petition for an election may be rejected if the withdrawal, under the circumstances, would be prejudicial to the other parties in an election. In *Mississippi Valley Structural Steel Company*, 115 NLRB 1288, fn. 1 (1956), the

Board refused to permit a union to withdraw its petition for an election where the withdrawal was filed 4 weeks after the election and where it was not consented to by the employer. In that case there was, of course, the possibility that the employer would have won the election and gained the benefits of a Certification of Results which, pursuant to Section 9(c)(3) of the Act, would have insulated it against another election in the bargaining unit for a 12-month period. In that case, the Board stated:

> Furthermore, as it is clear that the Petitioner is continuing its claim to represent the employees in this proceeding, and has not unequivocally disclaimed any right of representation for this group, we find no basis for the withdrawal of the petition. To allow such withdrawal under these circumstances and at this stage of the proceeding would be inequitable and prejudicial to other parties interested in the election.

In other circumstances too, a motion to withdraw a petition may be rejected. For example, in *Carpenter Baking Company, Inc.*, 112 NLRB 289 (1955), a petition had been filed by the Bakery and Confectionery Workers, but two other unions intervened in the proceeding seeking to represent certain of the employees based on their own showings of interest. After the hearing was held, but before a Board Decision was issued, the petitioner sought to withdraw its petition which was denied by the Board. However, notwithstanding the denial of the application to withdraw the petition, the Board did permit the petitioner to withdraw from the election with prejudice to its filing a new petition for a period of 6 months. Therefore, in that case, although the Board refused to permit the petitioner to withdraw its petition which would have adversely affected the rights of the intervening unions,[4] it also recognized that it should not force the Bakery Workers to participate in an election against its wishes.

There is also another circumstance in which disclaimers have been rejected. In *East Manufacturing Corporation*, 242 NLRB 5, 6 (1979), a petition was filed by a Teamsters union seeking to represent a group of employees who already were represented by an unaffiliated labor organization, called the East Employees Association. During the representation case hearing, the incumbent expressed its desire to disclaim interest in representing the employees even though its contract with the employer was in midterm and would have barred the Teamster's petition. The Board, in rejecting the disclaimer stated:

> In our view the Regional Director mistakenly concludes that, absent evidence of collusion or an agreement between the Petitioner and the Association, the disclaimer must be accorded legal effect. Such a result ignores both the peculiar circumstances of this case and the compelling policy considerations which are a cornerstone of the statutory scheme. The Board's contract-bar doctrine is intended to promote industrial stability between contractual parties and to afford employees a reasonable opportunity to change or eliminate their bargaining representative. Bargaining relationship stability is no less a concern for management than it is for labor organizations. Each party has substantial investments in the bargaining process and their investments deserve, where practicable, both deference and protection. Simply, to permit an incumbent and vital labor organization to disavow its lawful contractual obligations when it is not defunct derogates our contract-bar doctrine.

In light of the above, it is evident that, although a labor organization may voluntarily disclaim an interest in representing a group of employees and may withdraw its petition for certification, there are a number of exceptions to this general rule. In my opinion, however, none of the exceptions are applicable to the instant case.

In the present matter, Local 806 which has not participated in these proceedings from the outset of the hearing, has filed with the Regional Director for Region 22 a disclaimer of interest in representing the employees at the Jersey City facility of the Hartz Mountain Corporation. Also, it seeks to withdraw its petitions for certification and moves to withdraw its intervention in the petition filed by District 65 wherein that union seeks to represent the same group of employees. When the General Counsel stated on the record that he does not object to District 65's motion, it therefore follows that he also represents that the Regional Director would, if the representation cases were before him and not consolidated for hearing before me, approve Local 806's disclaimer and also approve its request to withdraw its petitions and intervention in Case 22-RC-7803.

There is no evidence in this record from which it may be inferred that Local 806's disclaimer is not unequivocal or not voluntarily made. On the contrary, the disclaimer is consistent with Local 806's nonparticipation in this proceeding and its apparent intent *not* to defend against at least those allegations asserted against that labor organization. While it is suggested by the Respondent that Local 806 has disclaimed interest simply because it does not have the financial resources to pursue the present litigation, this has not been shown to be the case.

It also appears to me that approval of Local 806's disclaimer would not be prejudicial to the other parties to the election even though the election was held more than 2 years ago. Obviously, it would not be prejudicial to District 65 which filed its own petition for an election and which urges approval of the disclaimer. Also, as Local 806 was the arithmetical winner of that election and the Company received only one vote, it is difficult for me to see any detriment to the company by permitting Local 806 to disclaim. Thus, unlike the situation in *Mississippi Valley Structural Steel Company, supra*, where

[4] See also *Anheuser-Busch, Inc.*, 246 NLRB 29 (1979), and *Weather Vane Outwear Corporation Inc.*, 233 NLRB 414 (1977), where the Board refused to permit unions to withdraw their petitions where such withdrawals would have adversely affected intervenors or other parties.

Cadmium & Nickel Plating, Division of Great Lakes Industries, Inc., 124 NLRB 353 (1959), cited by the Respondent is inapposite. In that case a disclaimer of interest was rejected because the evidence showed that it was not voluntarily made.

the company therein might have been the winner of the election and, therefore, enjoyed the fruits of a Certification of Results of Election, that possibility is not present in this case. Moreover, if the disclaimer were to be approved and another election held, Hartz Mountain would receive the benefit of having a second opportunity for its employees to vote against any union representation.

Nor are the circumstances in this case even remotely similar to those in *East Manufacturing Corporation, supra*. In that case, a disclaimer was rejected where it was made by a viable incumbent labor organization having a contract which was in midterm and which, therefore, was a bar to the petition filed by a rival labor organization. Here, although Local 806 was in a sense an incumbent union, it had achieved that status by virtue of unlawful assistance and its contract with the Company was declared unlawful.

In summary, it is concluded that the disclaimer filed by Local 806 was voluntary and should be honored. Therefore, since Local 806 has effectively disclaimed an interest in representing the employees of Hartz Mountain in the unit involved herein, it would be an anomaly to certify it as the exclusive collective-bargaining representative even though it achieved a majority of the votes cast in the election and even if the unresolved objections to the election were to be overruled.[5] Therefore, given the disclaimer, it is clear that the circumstances have radically altered as one of the parties to the election now seeks to withdraw from participation. Accordingly, in view of this substantial change in circumstances, it is my opinion and recommendation that the election held on April 20, 1979, be declared a nullity and that another election be held so that the employees can vote for or against the remaining parties (i.e., District 65 or the Employer).[6] Further, in view of the fact that the original election was held more than 2 years ago, it is recommended that an election be held as expeditiously as possible. In this respect, I reject as without merit, the Respondent's assertion that if an election is ordered, there should be a cooling-off period of at least 6 months.

Because of the passage of time and the Respondent's concession that there has been substantial turnover among the employees in the voting unit, it is recommended that the eligibility date be revised and made current. *The Interlake Steamship Co., a Division of Pickands Mather & Co.*, 178 NLRB 128, 129 (1969).

It also appears that, if Local 806's disclaimer of interest is approved and an election is held as recommended above, there would be insufficient reason to withhold approval of District 65's request to withdraw its unfair labor practice charges in the present cases. It is evident that the fundamental problem in these cases is to resolve an unresolved question concerning representation and, as a matter of public policy, the sooner the employees have a free and unfettered right to vote on this question, the better. In my opinion, as against the rights of the employees to freely exercise their franchise on this fundamental issue, all other considerations of policy pale in comparison. Thus, although the Respondent asserts that it should have the right to continue this litigation as a means of proving its innocence, that process, even if the Respondent were ultimately to prevail, would serve to delay, for many years, the determination as to whether or not its employees desire union representation. Moreover, the withdrawal of all the charges and the complaint against the company would largely serve to "vindicate" its position and nothing would preclude the Respondent from notifying its employees or the public at large that the charges were withdrawn and that it was not guilty of the allegations made against it. Indeed nothing contained in this recommended Order can or should be construed as stating or implying, in any way, that the Respondent was guilty of any improper conduct as alleged either by the General Counsel in the consolidated complaint or by District 65 in its objections to the election.[7]

In view of the above, it hereby is recommended that District 65's motion be granted in its entirety. Accordingly, I make the following recommended:

ORDER[8]

1. That the disclaimer of interest filed by Local 806, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, be and it hereby is approved.

2. That the request by Local 806 to withdraw its petitions in Cases 22-RC-7753 and 22-RC-7754 and its intervention in the petition filed by District 65 in Case 22-RC-7803, be and it hereby is approved with prejudice.

3. That the election held on April 20, 1979, be and it hereby is declared a nullity.

4. That Case 22-RC-7803 be severed and remanded to the Regional Director for Region 22 for the purpose of holding forthwith an election based on the Stipulation for Certification Upon Consent Election approved on March 30, 1979.[9]

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[5] In *Nachman Corporation*, 131 NLRB 1081 (1961), one of two competing unions was permitted to withdraw from an election proceeding based on its disclaimer of interest even though it had obtained a majority of the votes cast in a runoff election.

[6] Since Local 806 disclaims an interest in representing the employees, its name should not appear on the ballot. Also, as it would be virtually impossible for any other labor organization to intervene at this time, the employees would vote as to whether or not they wish to be represented by District 65. In the latter regard, another union would only be permitted to have its name on the ballot if its showing of interest predated the approval of the Stipulation for Certification Upon Consent Election, which took place on March 30, 1979. See Sec. 11026.2(c) of the National Labor Relations Board Casehandling Manual for Representation Proceedings. See also *Lufkin Foundry & Machine Company*, 83 NLRB 768, 770, 771 (1949).

[7] The Respondent's suggestion that District 65 and the General Counsel reimburse it for attorney's fees and expenses resulting from defending these withdrawn charges is, in my opinion, without precedent or justification. The Respondent concedes that it would not be a qualified applicant under the Equal Access to Justice Act, 94 Stat. 2325. See Federal Register, 46 F.R. 189 (September 30, 1981), for rules promulgated by the Board pursuant to that Act.

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] It is recommended that the eligibility date for the election be the last payroll period immediately preceding the date of this recommended Order. Also it is recommended that a revised and updated *Excelsior* list be supplied to District 65, U.A.W.

5. That the request by District 65, U.A.W., to withdraw its charges in Cases 22-CA-9106 and 22-CA-9588 be and it hereby is granted.

6. That the consolidated complaint in Cases 22-CA-9106 and 22-CA-9588 be and it hereby is dismissed in its entirety and that the record in this matter is closed.